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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-219872, et al. **DATE:** November 20, 1985

MATTER OF: Martin Widerker, Engineer

DIGEST:

1. Nonresponsibility determination may be founded on contracting agency's reasonable perception of inadequate prior performance by a contractor even where the contractor disputes the agency's interpretation of the facts.
2. A contracting agency, lacking any firsthand experience with an offeror, may base its nonresponsibility determination concerning that offeror on a recent preaward survey conducted by another contracting agency.
3. A nonresponsible offeror remains an interested party for purposes of a bid protest against alleged solicitation deficiencies if success on the protest may result in cancellation and resolicitation.
4. Where solicitation defines unit for inspection of custodial services as a thing to be inspected and also defines unit as an area of square meters, tasks which can be measured, such as floor cleaning, would be inspected by area of square meters. In the case of a latrine, the unit is the thing to be inspected and not an area since latrines are not generally described in square meters.
5. Implementation of a valid random sampling inspection system is a matter of contract administration which GAO will leave to the reasonable judgment of the contracting agency.

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6. Where contracting agency provides a general estimate of total floor area to be serviced under custodial services contract based on best information available, it is not required to break down the general estimate into specific estimates of different types of flooring.

Martin Widerker, Engineer (Widerker), a custodial services contractor, protests eight Army and two Air Force requests for proposals (RFP). ^{1/} Widerker is the apparent low offeror under these RFP's. With regard to six Army RFP's, ^{2/} Widerker protests that: (1) the inspection system was defective (unusable and unenforceable); and (2) the specifications failed to adequately describe the services required (lack of statement of specific floor types and estimates of each floor type). Widerker also protests the Army and Air Force finding that Widerker is nonresponsible under the 10 RFP's.

We deny the protests.

^{1/} The RFP's, agency, status and GAO file numbers are:

<u>RFP No.</u>	<u>Agency</u>	<u>Status</u>	<u>GAO file No.</u>
1. DAJA06-85-R-0246	Army	Awarded	B-219872.1
2. DAJA06-85-R-0247	Army	Awarded	B-219872.2
3. DAJA06-85-R-0248	Army	Awarded	B-219872.3
4. DAJA06-85-R-0249	Army	Awarded	B-219872.4
5. DAJA06-85-R-0250	Army	Awarded	B-219872.5
6. DAJA06-85-R-0251	Army	Awarded	B-219872.6
7. DAJA06-85-R-0090	Army	Awarded	B-220263
8. DAJA06-85-R-0085	Army	Awarded	B-220264
9. F61521-85-R-3033	Air Force	Preaward	B-220265
10. F61521-85-R-3036	Air Force	Preaward	B-220266

^{2/} RFP No.

1. DAJA06-85-R-0246
2. DAJA06-85-R-0247
3. DAJA06-85-R-0248
4. DAJA06-85-R-0249
5. DAJA06-85-R-0250
6. DAJA06-85-R-0251

The Army contracting officer found Widerker nonresponsible based on a negative preaward survey, an ongoing criminal investigation apparently related to an Army claim under a prior contract against Widerker to recover payments made to the firm where work allegedly was not performed and a review of inspection records showing Widerker's performance was unacceptable. The Air Force non-responsibility determination is based on the Army negative preaward survey. Widerker disputes the nonresponsibility determinations on the ground that they are not supported by the record.

GAO will not question a nonresponsibility determination absent a showing of bad faith by the contracting agency or the lack of any reasonable basis for the determination, since the determination is essentially a matter of business judgment and encompasses a wide degree of discretion. NJCT Corporation, B-219434, Sept. 26, 1985, 64 Comp. Gen. _____, 85-2 C.P.D. ¶ 342.

Widerker argues that underlying the Army's nonresponsibility determination is its displeasure at Widerker's refusal to pay the Army's claim against Widerker. Widerker points out that both the negative preaward survey and the criminal investigation concern the Army claim. Widerker urges that it is unreasonable to rely on the claim as a basis for a nonresponsibility determination where Widerker legally disputes the claim and it has not even reached the stage of a final decision by the contracting officer. Widerker further argues that it is unreasonable to conclude that it is nonresponsible based solely on the remaining ground of deficient performance of its prior contract because "[d]eductions under the prior contract have been less than one percent." Widerker points out the protested RFP's allow deficiencies in the form of acceptable quality levels of between 2 and 5 percent and that the greatest number of objections to Widerker's performance are found in recent informal user complaints and not in formal inspection reports. Widerker contends that users are not appropriate evaluators of its performance since they lack experience and training in inspection procedures and are unaware of specification requirements. Widerker also has provided letters from some users indicating satisfaction with Widerker's performance.

In Widerker's view, the current situation is the result of a personality conflict between Army personnel recently assigned to monitor contract performance and contractor personnel. Widerker claims that it was "ambushed by surprise"

since the Army had extended its contract three times from September 1984 to September 1985 and the Army had only issued one nonspecific sure notice during the entire period of the previous contract. Moreover, Widerker claims to have responsibly served the Army in the Stuttgart area for over 16 years and contends that it has not during that time suddenly changed into a nonresponsible contractor. According to Widerker, "The only thing that has changed is Government personnel." Finally, Widerker notes that the nonresponsibility determination and consequent award to second low offerors have cost the United States Government approximately \$446,234.

The Army reports that until recently, the Army's inspections of Widerker's performance have been inadequate. In 1984, the Army Audit Agency conducted an audit of Army inspection practices on custodial services contracts for the Stuttgart Military Community and found that:

"during the period 1 October 1983 through 31 May 1984, a total of 28,481 inspections should have been made and documented . . . [but] only 1,792 inspections were made."

The Army contends that little weight should be given the fact that only 1 percent of the total contract price was deducted because of the limited number of inspections and because:

"It is obvious, however, that more than 1 percent of the inspected work was deficient if a 1 percent deduction for all work was taken. In fact, 15.8 percent of the work inspected was deficient to justify a 1 percent contract price reduction. . . ." (Emphasis in original.)

Finally, the Army submits that even if Widerker's prior performance had been perfect:

"the fact that the performance was dreadful from May 1985 until the contracting officer made his determination late in August [1985] is adequate to support the nonresponsibility determination . . . [because] the nature of a contractor's most recent performance is more meaningful than is the performance farther removed in time."

Our review of apparently contemporaneous government records, covering Widerker's performance from April 1985 through August 1985, supports the Army's position concerning deficiencies in Widerker's performance. These records show that on numerous occasions, Widerker's supervisor was not available to resolve deficiencies in the services rendered. We have recognized that a serious concern in service contracting is the effective management of the work by the contractor to insure uniform performance levels consistent with contract requirements. United Food Services, Inc., B-215538, Oct. 23, 1984, 84-2 C.P.D. ¶ 450. Thus, the Army reasonably could take into consideration in determining Widerker nonresponsible the unavailability of Widerker's supervisor to resolve deficiencies. We also have held that a nonresponsibility determination may be founded upon a contracting agency's reasonable preception of inadequate prior performance by a prior contractor even where the agency's interpretation of the facts is disputed by the contractor. Howard Electric Company, 58 Comp. Gen. 303 (1979), 79-1 C.P.D. ¶ 137. Therefore, we find that Widerker has failed to establish that the Army's nonresponsibility determinations lacked a reasonable basis.

We note that the Army preaward survey, which the Air Force relied on in making its nonresponsibility determination, was also based in part on the contemporaneous performance records. As the Air Force appears to lack any first-hand experience with Widerker, we see nothing objectionable in its use of the Army preaward survey as the basis for its nonresponsibility determination, see S.A.F.E. Export Corp., B-209491 et al., Aug. 2, 1983, 83-2 C.P.D. ¶ 153, since the nature and extent of the information needed to assure an agency that a firm will meet its contractual obligations is necessarily a matter for the contracting officer's judgment. Jack Roach Cadillac--Request for Reconsideration, B-200847.3, Aug. 28, 1981, 81-2 C.P.D. ¶ 183. Consequently, we find that Widerker has also failed to establish that the Air Force acted unreasonably in declaring Widerker nonresponsible.

Thus, we deny Widerker's protests against the Army and Air Force determination that Widerker is a nonresponsible offeror.

The Army urges our dismissal of Widerker's other protest allegation, that six of the Army RFP's contain deficiencies, on the ground that since Widerker is nonresponsible, it is no longer an interested party. We disagree. Widerker is an interested party to protest solicitation

deficiencies because success in its protest may result in cancellation and render the protester eligible to compete for the resolicitation. See Engine and Equipment Co., Inc., B-199480, May 7, 1981, 81-1 C.P.D. ¶ 359. The fact that Widerker has been found nonresponsible for this procurement does not mean that Widerker would be found nonresponsible on a resolicitation, since a new determination generally would be required based on up-to-date information. See S.A.F.E. Export Corp., B-208744, Apr. 22, 1983, 83-1 C.P.D. ¶ 437.

Widerker objects to alleged ambiguities in the RFP provisions describing the random sampling inspection system. Widerker asks for further definition of the terms "lot," "unit" and "defect"; however, its main concern is the definition of "unit." Widerker also seeks assurances regarding the representative nature of "units" selected for inspection. Finally, Widerker questions the manner in which inspection results will be applied to the contract's administration (that is, the effect of a "unit" being rejected and the use of daily inspection results in calculating monthly payments).

The RFP's contain inspection provisions under the heading performance requirements summary (PRS) that authorize random sampling of the contractor's performance of key service outputs and deduction of sums from the contractor's monthly invoices for unsatisfactory service. The random samplings are conducted using the concepts of Military Standard-Sampling Procedures and Tables for Inspection by Attributes, Apr. 29, 1963 (MIL-STD-105D). Under this inspection procedure, inspection results attributable to a small randomly selected portion (sample) of a larger group (lot) of similar items (units) are attributed to all items in the larger group within a stated margin of error. The PRS defines the key service outputs (lots) which will be inspected. They consist of services such as trashing, vacuuming, floor maintenance, wet mopping, latrine services, and outdoor cleaning.

The solicitations contain numerous drawings of portions of actual building floor plans designated "plots." The plots consist of floor plans of a military police station, an attic, a craft shop, a chapel basement, etc. The plots were derived as follows: (1) the total service area is divided by the number of buildings to obtain an average service area; and (2) every building with a service area smaller or equal to the average service area is designated a plot. Consequently each building is at least one plot and larger buildings consist of two or more plots.

In response to Widerker's initial protest against the specifications filed with the Army, the RFP's were amended to further explain the manner of inspection. The amendment, in part, reads:

"As described in the solicitation, the government's primary method of insuring contractor performance will be by random inspection of services. To accomplish this, an appropriate number of service locations (plots) will be selected on a random basis and inspected for performance of all required tasks. The findings for those service locations (plots) will be considered representative of all service outputs (lot), for the period covered by the inspection."

Widerker points out that the PRS defines unit as

"The average number of sgm [square meters] derived, as a quotient, by dividing the total sqm of building areas receiving custodial services by the total number of buildings under contract."

Widerker asserts that, since the amendment shows that the plots are the areas of inspection for all required tasks, it would appear that the plot is the unit. In any event, Widerker seeks clarification as to what a unit for inspection will be.

It is the obligation of the offeror to read the RFP as a whole and in a reasonable manner. Bay Decking Company, Inc., B-215248, Jan. 22, 1985, 85-1 C.P.D. ¶ 77. The amendment to the RFP stated that plots would be randomly inspected, and that the inspection findings in the plots sampled would be used as representative of all lots for the period covered by the inspection. The PRS designates a lot as a number of units. Thus a lot, for example, is vacuuming to be performed in all plots.

A unit is defined in the MIL-STD as the thing to be inspected to determine its classification as defective or nondefective. The MIL-STD also indicates a unit may be a single article or an area. We think the MIL-STD definition was clearly intended to cover, for example, vacuuming of an area which can be measured by square meters, as well as "trashing" (placing trash in receptacles), which is not normally evaluated in terms of an area. The performance work statement (PWS) definition of units which defines units

in terms of square meters derived by dividing square meters of buildings by the number of buildings is thus applicable to tasks which are measured in terms of area, such as vacuuming or floor cleaning. Under these circumstances, we agree with the Army's statement that:

"The Government recognizes that the term 'unit' is defined . . . [in] the PWS in square meters. The term 'unit' is also used . . . [in] the PRS [a lot is a number of units]. Obviously, trashing, latrines, urns, etc. cannot be measured in square meters. The use of the term 'unit' in a way other than as defined in the PWS is unfortunate, but is certainly not misleading."

Thus, the offerors were on notice that a unit to be inspected for determining defective performance within plots was either a thing, such as latrines, or an area, such as floors measured in accordance with the PWS definition.

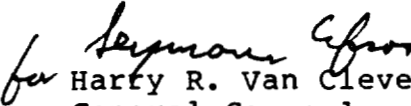
Regarding Widerker's concern about the definition of "defect," we find the RFP definition legally sufficient. The MIL-STD definition states that a defect is any nonconformance of the unit with specified requirements. The RFP established allowable variances from standards which must be exceeded before the government will reject a specific service. Moreover, we have noted that "defects" can occur in innumerable factual circumstances during contract performance and are not always capable of precise definition. Because of this, the specific application of the term "defect" should be left to the reasonable judgment of the contracting agency during contract performance. United Food Services, Inc., B-215538, Oct. 23, 1984, 84-2 C.P.D. ¶ 450.

Both Widerker's concern that the units selected for inspection may not be representative of the lots and its concern about the manner in which the government will apply inspection results are matters of contract administration. For example, should a contractor object to an inspection of an area of floor on the ground that the contractor was prevented from cleaning the floors because of unsafe conditions, this would be a matter for resolution under the contracts disputes clause. There is no requirement that a solicitation be so detailed that there are no performance uncertainties or that it addresses every possible eventuality. Starlite Services, Inc., B-219418, Oct. 15, 1985, 85-2 C.P.D. ¶ ____.

Regarding Widerker's contention that the specifications failed to adequately describe the services required because they lack a statement of the specific floor types and their respective area, we find no merit in this contention. The RFP's provided offerors with exact floor plans showing the areas requiring custodial services and their respective areas in square meters. Widerker argues that a further breakdown by floor type, such as with or without carpet, is necessary for two reasons: (1) inexperienced offerors may not be able to properly compute their prices without this information; and (2) a breakdown of specific floor types is necessary for implementation of the inspection system because, without one, the Army cannot properly project the inspection results to calculate the deductions. Widerker asserts that its low price is attributable to its knowledge (as the incumbent) of the breakdown and that other offerors' prices were higher because they did not have the floor type breakdown.

The Army reports that it made provision for site visits at which all offerors could obtain information concerning the breakdown of floor types. Widerker acknowledges this, but asserts that insufficient time was allowed for site visits prior to the closing date. We note that none of the other offerors have supported Widerker's contentions. In any event, we have held that where a contracting agency provides a general estimate of total floor area based on the best information available, it is not required to break down the general estimate into specific estimates of different types of flooring. See Hero, Inc., 63 Comp. Gen. 117 (1983), 83-2 C.P.D. ¶ 687.

We therefore deny Widerker's protest against alleged deficiencies in the RFP's.

for 
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General Counsel